Court of Appeals, State of Michigan

ORDER

People of MI v Phillip Poelinitz

Docket No. 271065

LC No. 06-2268-01

Jane E. Markey
Presiding Judge

Henry William Saad

Kurtis T. Wilder
Judges

The Court orders that the motion for reconsideration is DENIED.

The Court orders that the November 29, 2007 opinion is hereby AMENDED. The opinion contained the following clerical error: on page three, the opinion states that the sentencing guidelines recommended range for defendant's sentence was 15 to 75 months. The actual sentencing guidelines recommended range was instead 45 to 75 months.

As a result of this clerical error, the opinion also stated at page three that "[d]efendant's actual minimum of 45 months falls in the middle of the sentencing guidelines range." Therefore, the opinion is hereby further AMENDED to state: "[D]efendant's actual minimum of 45 months falls at the bottom of the sentencing guidelines range."

In all other respects, the November 29, 2007 opinion remains unchanged.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

FEB 15 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v PHILIP POELINITZ, Defendant-Appellant.	UNPUBLISHED November 29, 2007 No. 271065 Wayne Circuit Court LC No. 06-002268-01

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of criminal sexual conduct in the third degree, MCL 750.520d(1)(a) (victim between 13 and 15 years old). The trial court sentenced defendant to serve concurrent terms of imprisonment of 45 months to 15 years. Defendant appeals as of right. We affirm, but remand for a correction in the judgment of sentence. We decide this case without oral argument pursuant to MCR 7.214(E).

I. Facts

This case arises from allegations that defendant, while an employee at Inkster High School, had sex on two occasions with a student who was approximately one month under the age of 16 at the time. Complainant testified that she became familiar with defendant because of their respective involvements in band class and the wrestling season. Complainant detailed the development of a flirtatious relationship, progressing to the exchange of phone numbers and candid discussions about sex. According to complainant, defendant was aware of her age and virginity at this time. Complainant testified that, on one occasion she and defendant engaged in mutual genital sex and fellatio in the school's band room, and that on this occasion defendant eschewed use of a condom to minimize discomfort.

A second sexual encounter followed during which complainant and defendant engaged in another unprotected act of mutual genital sex, preceded by oral sex, this time in a locker room. Complainant testified that after the sexual encounters she started "having symptoms," then was diagnosed with a sexually transmitted disease. According to complainant, when she informed defendant, he urged her not to disclose his identity but instead to tell her mother that she had sex with someone she met on the street.

The trial court found defendant guilty as charged. On appeal, defendant argues that he was both convicted and sentenced without the benefit of effective assistance of counsel.

II. Assistance of Counsel

The United States and Michigan constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The right to counsel is a right to the *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

A defendant pressing a claim of ineffective assistance must overcome the strong presumption that counsel's decisions concerning the choice of witnesses, or theories to present, were exercises of sound trial strategy. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999); *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). See also *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

A. Convictions

Defendant argues that trial counsel failed to subject the prosecution's case to meaningful adversarial testing because trial counsel elected to waive his opening statement and closing argument, subjected only one prosecution witness to cross-examination, and declined to call any defense witnesses. We find no merit in this argument.

The decision to waive a jury trial in favor of trial by the court was defendant's to make personally. See MCR 6.402(B). Especially because the facts were determined by a learned judge, not a lay jury, we find it unremarkable that defense counsel chose to waive his opening statement and closing argument. We further note that defendant suggests no commentary that defense counsel might have used in those situations that might have been beneficial to him.

In fact, in attacking counsel's performance, defendant specifies no argument, theory of defense, or cross-examination strategy that might gainfully have been offered, leaving this Court to guess how things might have been different. We decline the invitation to speculate. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Further, defendant was at liberty to insist on testifying himself, see *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987),[1] and accordingly must share in the responsibility for the lack of presentation of at least himself as a defense witnesses. Lacking any indication to the contrary, we have no reason to suppose that any benefit would have come from bringing any other defense witnesses.

Moreover, the evidence included defendant's statement to the police, in which he confessed the particulars of the crimes in ways well comporting with complainant's account. In light of the overwhelming evidence of defendant's guilt, along with defendant's failure to articulate precisely how defense counsel might better have thrown the prosecutor's case into doubt, defendant fails to show that counsel could have done anything different to change the result, or that the proceedings were fundamentally unfair or unreliable. *Poole*, *supra*.

B. Sentences

The recommended range for defendant's minimum sentence under the sentencing guidelines was 15 to 75 months. Defendant's actual minimum of 45 months falls in the middle of the sentencing guidelines range.

Generally, "if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004), citing MCL 769.34(10). We note that it appears defendant seeks to avoid the application of this rule by characterizing this sentencing issue as one of ineffective assistance of counsel. See *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

Defendant argues that defense counsel was ineffective because counsel failed to take additional steps to persuade the sentencing court to impose a minimum sentence that constituted a downward departure from the range under the guidelines. We find no merit in this argument.

Defendant cites his presentence investigation report (PSIR) for the propositions that he had had no involvement with the criminal justice previously, came from a stable family environment, was gainfully employed, turned himself into the police, and expressed remorse even before trial. While defendant concedes that defense counsel argued some of those facts in the course of asking the sentencing court for a downward departure, nevertheless, defendant contends that counsel should have bolstered the mitigating force of those facts by offering character references, or supporting letters, from family, employers, or clergy, or by determining whether complainant and her family preferred a lenient sentence.

[1] But see *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000) (where a defendant insisted on testifying, counsel's failure to ensure that the jury fully understood the defendant's account of events did not constitute ineffective assistance, because that account was "so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to say").

Defendant fails to demonstrate that defense counsel knew or should have known of persons to serve as character references on defendant's behalf at sentencing, and also fails to provide evidence that the victim or her family supported leniency in sentencing. Moreover, a sentencing court may deviate from the guidelines for only a "substantial and compelling reason . . . ." MCL 769.34(3). See also *People v Babcock*, 469 Mich 247, 255-256, 272; 666 NW2d 231 (2003). A substantial and compelling reason is one that must be one that keenly or irresistibly grabs the attention of the court, and as such arises only in exceptional cases. *Id.* at 257-258. The mitigating factors of which defendant makes issue are in fact not so exceptional that they keenly or irresistibly grab our attention.

Given the facts in this case, it appears that defense counsel provided defendant excellent representation by obtaining a sentence in the middle of the guidelines.

III. Conclusion

Defendant has failed to show that trial counsel did not perform reasonably, or that any shortcomings on counsel's part affected the result, or rendered the proceedings unfair or unreliable. Accordingly, we affirm defendant's convictions and sentences.

However, we note that the judgment of sentence indicates jury-based convictions, rather than trial by the court. Accordingly, we remand this case for the ministerial task of preparing an amended judgment of sentence reflecting convictions following a bench trial.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder